Nos. 77-278, 77-281, and 77-282

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHAMPION INTERNATIONAL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

YOUNG AND MORGAN, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

FRERES LUMBER COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A9-A16)[1] is reported at 557 F. 2d 1270. The opinion of the district court (Pet. App. A1-A8) is unreported.

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[1]"Pet. App." refers to the appendix to the petition in No. 77-278, unless otherwise indicated.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1977. The opinion of the court of appeals was modified and a petition for rehearing with suggestion for rehearing *en banc* was denied on July 20, 1977 (Pet. App. A17-A18). The petitions for a writ of certiorari were filed on August 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the findings of the district court, which the court of appeals affirmed, that petitioners had conspired to eliminate competitive bidding on, allocate bids for, and stabilize the price of timber-cutting rights sold at auction by the United States.

2. Whether the evidence establishes that petitioners' violation substantially affected interstate commerce.

STATUTE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

STATEMENT

The United States Forest Service, an agency of the United States Department of Agriculture, sells the right to harvest timber from tracts of land in the national forests. It sets a minimum appraised value and awards the right to the highest bidder that meets or exceeds that value (Pet. App. A2, A4). For many years, petitioners have purchased such rights from the Detroit Ranger District of the Willamette National Forest in Oregon.

Petitioners purchased approximately 90 percent of Detroit District timber offered at auctions between 1968 and 1972 (Pet. App. A10-A11).

In September, 1974, petitioners were indicted on a single count charging that beginning on or about June, 1967, they combined and conspired in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The conspiracy consisted of a continuing agreement (1) to eliminate competitive bidding for United States Forest Service timber; (2) to allocate such timber among themselves; and (3) to fix, reduce, and stablize the price paid for such timber at or near the minimum acceptable bid the Forest Service set (Pet. App. A11).

In a non-jury trial, the district court found petitioners guilty of conspiring to eliminate competition and stabilize prices by allocating timber bids amongst themselves[2] (Pet. App. A7). It noted that a period of highly competitive bidding that began in 1964 ended abruptly on June 2, 1967, but it concluded that this change did not result from an agreement among the bidders (Pet. App. A3-A4). The court found, however, that thereafter petitioners participated in a series of meetings at which each discussed its interest in specific timber areas to be offered for sale by the Forest Service (Pet. App. A5-A7).

The court further found that under the bidding pattern evolving from these meetings, only one party bid on a particular area even, when at a prior meeting, more than one firm had expressed interest in that area; that all of the bids were made, without competition, at or near the mini-

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[2]The Frank Lumber Co. was also named as a defendant. At the close of the government's case, the district court acquitted that company and two individual defendants (Pet. App. A1-A2).

mum appraised value; and that since a timber mill's survival depended on obtaining a supply of raw material, such a consistent pattern of mutual forbearance was unlikely unless the mill operator knew that it would obtain timber at a subsequent sale (Pet. App. A5-A7). The court held that while meetings among competitors are not themselves illegal, even when coupled with an exchange of business information, the petitioners had implicitly agreed to act upon the exchanged information (Pet. App. A6). The court concluded that the series of meetings and corresponding bidding patterns shown by the evidence established beyond a reasonable doubt that "the defendants entered into an implied agreement: to eliminate competition for these timber sales; to reduce the price paid for these timber sales; and, to allocate these timber sales among themselves" (Pet. App. A7).[3]

Petitioners stipulated (R. 691) that most of the end products produced from the timber moved in interstate commerce. The district court found that "[t]he requisite element of interstate commerce exists" because the petitioners purchased and processed the timber "with the express intent that the end-products they manufactured would continue in the stream of interstate commerce" (Pet. App. A8).

The court of appeals affirmed (Pet. App. B, C). It held that the evidence was sufficient to support the convictions (Pet. App. A12—A14). It observed that while in a general way an individual mill's potential interest in a specific timber sale could be predicted by anyone familiar with that

[3]The district court found, however, that the government failed to prove that the bidding up of non-conspirators was a part of the conspiracy, but held this allegation not to be an essential element of the crime charged (Pet. App. A7) The court of appeals agreed (Pet. App. A14).

mill's operation, petitioners had been unwilling to leave matters to chance. Rather, at the series of meetings, they advised each other of the future sales in which they were most interested. As a result, the court of appeals concluded, "there was no doubt that the defendants 'had an understanding' about bidding" (Pet. App. A13). The court of appeals also agreed with the district court that the necessary effect upon interstate commerce had been proved (Pet. App. A14).

ARGUMENT

The court of appeals correctly held that the evidence is sufficient to support petitioners' convictions. There is no reason for this Court to consider further the two essentially factual issues the courts below resolved against petitioners.

1. Petitioners contend that the district court improperly based its finding of an implied agreement on circumstantial evidence (Champion Pet. 10-11; Freres Pet. 19-20). It is well established, however, that any implicit or explicit agreement among competitors, whether sellers or buyers, to depress or stablize prices is a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. 1. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 396-397, 400; *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 212-213; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219.[4] A specific intent to violate the law is not required. *United States* v. *Patten*, 226 U.S. 525, 543; *United States* v. *Masonite*

[1]An agreement among competitors to fix or stabilize prices by indirect means, such as an allocation of territories or contracts amongst competitors, also constitutes a *per se* violation. *United States* v. *General Motors Corp.*, 384 U.S. 127, 147; *United States* v. *Topco Associates, Inc.*, 405 U.S. 596; *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 240-241; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593.

Corp., 316 U.S. 265, 275. Nor need the proof show an express agreement. *United States* v. *General Motors Corp.*, 384 U.S. 127, 142-143; *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 142. Indeed, precisely because of its secret or camouflaged nature, a price-fixing agreement such as that proved here often may be established only by circumstantial evidence. Cf. *Iannelli* v. *United States*, 420 U.S. 770, 777 n. 10; *Glasser* v. *United States*, 315 U.S. 60, 80. As this Court held in *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809-810, "[n]o formal agreement is necessary to constitute an unlawful conspiracy. * * * [t]he essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words."

Contrary to petitioners' assertions (Freres Pet. 23-26; Young Pet. 12), the district court's finding that the defendants agreed to eliminate competitive bidding did not rest solely on inferences from statistical evidence of their bidding patterns, or from evidence of independent consciously parallel activities. Instead the trial court relied on petitioners' discussions of upcoming sales at a series of meetings—conduct which showed a conspiratorial pattern (Pet. App. A7):

> This pattern shows that when only one party expressed interest in a particular sale, the others refrained from bidding against him when that sale occurred. In several instances, more than one party expressed interest in a sale but, when that sale occurred, all but one of the participants, although qualified to bid, did not do so. All of the sales listed above were sold at or near the appraised price without opposition. I find that the defendants entered into an implied agreement: to eliminate competition for these timber sales; to reduce the price paid for these timber sales; and, to allocate these timber sales among themselves. At the conclusion of each of the meetings described above, for example, it was understood that the most interested buyer would purchase the sale. No one really committed himself not to bid but in sale after sale over a four year period, the one who had expressed the highest interest in a sale was the one who took the sale without opposition. Where, as here, an operator's existence depends upon his raw material supply, one would not likely pass up a sale unless he knew that a subsequent sale would go to him.[5]

Viewing the evidence of the meetings and their consequences in the light most favorable to the government (*Glasser* v. *United States, supra; Hamling* v. *United States*, 418 U.S. 87, 124), the court of appeals correctly concluded that "there was no doubt that the defendants 'had an understanding' about bidding" (Pet. App. A13).

2. The court of appeals also correctly sustained the district court's finding that "[f]rom evidence produced at trial * * * the charged conspiracy had a substantial effect on interstate commerce" (Pet. App. 14).

A conspiracy sufficiently "affects" interstate commerce under the Sherman Act if a substantial volume of commerce is involved and the illegal activities have an impact on such commerce. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 784-785; *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 744-746; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219; *United States* v. *Women's Sportswear Manufacturers Association*, 336 U.S. 460, 464; *Northern Securities Co.* v. *United States*, 193 U.S. 197, 332.

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[5]The resulting bidding pattern of mutual forbearance contrasted sharply with the bidding experience in similar districts over the same time period (Govt. Exs. 1, 2). In our view such evidence corroborates the findings based on the meetings that petitioners had reached an understanding to limit their bids.

Under this standard, the evidence established the requisite effect on interstate commerce. The uncut timber involved was valued at more than $20 million and the end-products at approximately $85 million (Govt. Exs. 368-372). Petitioners stipulated that most of the end products produced from such timber "moved in interstate commerce" (R. 691).[6] No further proof was necessary.

Champion International contends that the indictment did not allege the affecting-commerce theory (Champion Pet. 3, 13). But those precise words need not be used in an indictment, provided the defendant is sufficiently informed of the offenses with which it is charged to be able to prepare its defenses. *Hamling* v. *United States*, 418 U.S. 87, 117. The indictment in this case set forth in detail the manner in which the logged timber is sold as logs or processed into wood products shipped to purchasers outside the State of Oregon (Young Pet. App. A4-A5). Champion thus was not misinformed.

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[6]Even if the district court viewed the indictment as charging restraints in, rather than merely affecting, interstate commerce, the convictions were proper. The "flow of interstate commerce [is] the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 195. Petitioners' purchases of most of the District's timber and their stipulation concerning interstate shipments prove a recurring course of commerce among the states which satisfies the jurisdictional requirement. *Swift and Co.* v. *United States*, 196 U.S. 375, 398-399.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1977.

DOJ-1977-10

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